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Supreme Court, U.S.
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No. 03-1477

In The
**Supreme Court of the United States**

Gerald J. Gesiorski and
Dawn S. Gesiorski,
*Petitioners*,

v.

BRANCH BANKING & TRUST CO.,
f/k/a Carroll County Bank & Trust,
*Respondents*,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit;
Questioning the Jurisdiction of
The United States Bankruptcy Court
For The Middle District of Pennsylvania,
Article I Judge

# PETITIONERS REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. There is a compelling reason for this Honorable Court to, not reconsider, but, to determine the issue now placed before this Honorable Court; that Petitioners, in Reorganization which is an Equity Proceeding, must be heard before an Article III Judge as mandated by the Constitution.

2. There is a compelling reason for this Honorable Court to, not reconsider its holding that appellants who fail to preserve for appeal any issue which they failed to raise in the lower court and any matter as to which they failed to place into the record on appeal, but that the District Court Judge failed to look to the substance of the Complaint rather than the form in violation of this Honorable Courts holding.

3. There is a compelling reason for this Honorable Court to, not reconsider its holding that issue preclusion, which does not apply in this instant case, applies to bankruptcy proceedings, but, that the Mortgage Note was void, tainted with the contamination of the originating acts of the Officers of Carroll County Bank & Trust.

4. There is a compelling reason for this Honorable Court to, not reconsider its holding that litigants are bound by the actions of their attorneys, but, that this is an ongoing Reorganization proceeding which has never been concluded which Petitioners have effectively stood on the Table Top in the middle of Court and protested to the District Court Judge of the violations occurring within those proceedings.

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Pursuant to Rule 15-6 of the Rules of the Supreme Court of the United States, Petitioners Gerald J. Gesiorski and Dawn S. Gesiorski submit this Reply Brief in response to the Brief in Opposition of Respondent Carroll County Bank & Trust (CCB&T).

## I. CCB&T HAS CONCEDED THE ERROR OF THE COURT BELOW.

Respondent CCB&T does not defend the decision of this Honorable Court that "That reorganization is an equitable procedure, not one of bankruptcy" held in the case of *Lowden v. Northwestern National Bank & Trust Co.* 298 U.S. 160, 1936." Nor the concurrence of the Congress ( "**[U]nless the district court has some independent basis for article III jurisdiction – diversity – will create constitutional problems as great as the problem solved by the amendments**" (emphasis added) H.Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 3 U.S.Cong.News '84, p. 596; 8725 Cong. Rec. - Senate, June 10, 1938; 35456 Cong. Rec.-House, Oct. 28, 1977; 35683 Cong. Rec. - House, Oct. 28, 1977; 35451 Cong. Rec. - House, Oct. 28, 1977; H.R. Rep. No. 95-595, 95th Cong., 2d Sess., 5 U.S.Cong.News '78, pp. 5991-92; H.Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 3 U.S.Cong.News '84, p. 595.) and that of the Attorney General ("Report of the Attorney General on Bankruptcy Law and Practice" found within Senate Doc. No. 65, February 24, 1932).

## II. THE LOWER COURT'S DECISION SHOULD BE VACATED AND REMANDED TO THE THIRD CIRCUIT TO CONFORM ITS DECISION TO THE INTERPRETATION OF THIS HONORABLE COURTS HOLDING TO LOOK TO THE SUBSTANCE OF THE COMPLAINT RATHER THAN THE FORM.

As a result of the lower court's decision to affirm the District Court's refusal to look to the substance of the Petitioner's Complaint instead of the Form as this Honorable Court has directed in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 652 (1972), the District Court, being the court of original jurisdiction failed to address each issue placed before it as required ( "No one can question that the court

which has jurisdiction of the principal question, must exercise jurisdiction over every question." *Osborne v. United States*, 86 U.S. 577, 884 (1874)), thereby placing Petitioners in harms way subject to foreclosure proceedings against our Home with no remedy at law.

## III. THE MORTGAGE NOTE SHOULD BE DETERMINED TO BE VOID WHERE THE PRINCIPAL TRANSACTION WAS INVALID ON THE GROUND OF FRAUD.

Where "the principal transaction was invalid on the ground of fraud, according to the principle that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it; *nul prendra advantage de son tort demesne*. Broom's Legal Maxims, 285. The Respondent, seasoned in business, caused omissions and mistakes in the agreement which Petitioner relied upon to our detriment, which Respondent further attempted to conceal, misrepresent, and unfairly act upon. ( "Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.'... [S]pecific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity,..." *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236-37).

Issue Preclusion does not apply in this instant case of Reorganization which is ongoing. The doctrines of issue preclusion (which applies only to each issue which has been litigated and decided, Haize v. Hanover Ins. Co., 536 F2d 576, 579 (3rd Cir. 1978)), waiver and equitable estoppel must not be permitted by this Honorable Court.

## IV. PETITIONER CANNOT BE HELD TO THE ACTIONS OF THEIR ATTORNEY IN AN ONGOING REORGANIZATION PROCEEDING NEVER CONCLUDED WHICH PETITIONERS HAVE DEMONSTRATED ATTORNEY ACTED WITHOUT AUTHORIZATION.

Petitioner's Attorney has never received General or Specific

Power of Attorney nor Express Authority **to sign on behalf of the Gesiorskis** the Reorganization Plan or any of the numerous Consent Orders Granting Motions to Lift the Automatic Stay and for Adequate Protection. Gesiorskis have not established **either express, implied**, or **apparent authority** to enter into a settlement on Gesiorskis behalf and **rebut this presumption**.

"In general, an attorney has no authority to settle his client's case solely by virtue of his general power to handle the case. *Holker v. Parker*, 11 U.S. (7 Cranch) 436, 452, 3 L.Ed. 396 (1813). Instead, an attorney can only enter a binding compromise if the client has authorized him to do so." *Garabedian v. Allstate Engineering Co.*, 811 F.2d 802 (3rd Cir. 1987). "... Pennsylvania law clearly provides that an attorney must have express authority to settle litigation, *see e.g.*, *Rothman v. Fillette*, 503 Pa. 259, 264, 469 A.2d 5433, 545 (1983)." *Smith v. Delaware Valley Auto Spring Co.*, 642 F.Supp. 1112 (E.D.Pa. 1986). "An attorney-client relationship does not, without more, confer upon the attorney the authority to settle his client's case. *See, e.g.*, *Archbishop v. Karlak*, 450 Pa. 535, 540, 229 A.2d 294, 297 (1973); (*cites omitted*)" *Smith v. Delaware Valley Auto Spring Co.*, 642 F.Supp. 1112 (E.D.Pa. 1986).

"Although some cases have held that the control an attorney has over the conduct of a case impliedly authorizes him or her to bind the client by a confession of or consent to a judgment, other decisions maintain the view that **an attorney has no authority to enter a consent decree, or confess judgment without the client's direction, knowledge, or consent**, and if a consent judgment or decree is entered against the protest of the client, or contrary to his or her instructions not to compromise, **the judgment or decree will not be binding on the client**." 7 Am.Jur.2d Attorneys at Law § 175, 214. (emphasis added)

"During the progress of a trial, an attorney of record has implied authority to enter into stipulations and agreements respecting matters of procedure.... **but does not apply to matters affecting the cause of action itself**." 7 Am.Jur.2d Attorneys at Law § 167, 206. (emphasis added) "**In the absence of special authority**, a court will not uphold a stipulation that operates as a surrender of substantial rights of a client." 7 Am.Jur.2d Attorneys at Law § 167, 206. (emphasis added)

The **burden of proving** that attorney had actual, that is, **express or implied authority** to settle case **was on party asserting agency**.

*Smith v. Delaware Valley Auto Spring Co.*, 642 F.Supp. 1112 (E.D.Pa. 1986). "[R]ebuttal of the presumption renders any purported settlement ineffective. *See generally* Annotation, *Authority of Attorney to Compromise Action*, 30 A.L.R.2d 944 (1953)." *Garabedian v. Allstate Engineering Co.*, 811 F.2d 802 (3rd Cir. 1987).

11 U.S.C.S. § 362(d) allows retroactive relief and validates proceedings that would otherwise be void ab initio; annulment can operate retroactively to rehabilitate violation of automatic stay. *In re* Siciliano 13 F.3d 748 (C.A.3 Pa. 1994).

## CONCLUSION

The decision of the court below should be vacated and remanded to the Third Circuit to correct its ruling to conform with the directions of this Honorable Court.

## VERIFICATION

We, Gerald J. Gesiorski and Dawn S. Gesiorski, do hereby verify under penalty of perjury under 28 U.S.C. § 1746(1), that the foregoing statements are true and correct, and this petition is made in good faith, is not frivolous, and is not interposed for the purpose of delay.

Respectfully Submitted,

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